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Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance

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I. INTRODUCTION

On June 12, 2008, the United States Supreme Court handed down the ruling in *Boumediene v. Bush*,[1] a decision considered to be one of the most important rulings on separation of powers ever issued.[2] In that landmark case, the Supreme Court held that individuals detained at Guantanamo Bay had the constitutional pri-

1. Boumediene v. Bush, 553 U.S. 723 (2008).
2. Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantanamo*, N.Y. TIMES, June 13, 2008, http://www.nytimes.com/2008/06/13/washington/13scotus.html.

vilege of habeas corpus.[3] Though *Boumediene* established this overarching rule, the Supreme Court did not define the scope or parameters of the habeas privilege, instead leaving many questions to be answered by the district courts which had jurisdiction over these cases.[4]

Because *Boumediene* left several issues for the lower courts to decide, there was concern that those courts would have broad power to shape the law for all Guantanamo detainee cases in a manner that would expand the power of the Judiciary at the expense of the Executive Branch. As Justice Scalia remarked in his *Boumediene* dissent, the Court's decision was "an inflated notion of judicial supremacy[5] [that the] . . . Nation will live to regret[.]"[6]

While *Boumediene* garnered significant attention as a landmark decision, the Supreme Court unanimously decided another case on June 12, 2008, which had nothing to do with Guantanamo Bay, but would soon become the focal point of a separation of powers issue brewing over those cases.[7] The Court in *Munaf v. Geren* concluded that American citizens being held by the Multinational Force-Iraq ("MNF-I")[8] could petition for a writ of habeas corpus in the United States federal courts, but those courts were powerless to prevent the transfer of the petitioners to the Iraqi Government for the purposes of criminal prosecution.[9] In making this determination, the Supreme Court noted that the Judiciary was not in a position to "second-guess" the Executive's policy determinations, as it is within the realm of the Executive Branch to handle issues regarding foreign relations.[10]

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3. *Boumediene*, 553 U.S. at 771.

4. *Id.* at 798. The United States Supreme Court previously held that United States district courts had jurisdiction to hear claims of unlawful detention posed by Guantanamo detainees. Rasul v. Bush, 542 U.S. 466, 484 (2004). The *Boumediene* Court also suggested that consolidating these cases into one circuit would be beneficial for the Government, and suggested that the Government could file a motion for change of venue to the United States District Court for the District of Columbia if a case were originally filed in a different Circuit. 553 U.S. at 795-96 (citations omitted).

5. *Id.* at 842 (Scalia, J. dissenting).

6. *Id.* at 850.

7. Munaf v. Geren, 553 U.S. 674 (2008).

8. "The Multinational Force-Iraq (MNF-I) is an international coalition force operating in Iraq composed of 26 different nations, including the United States. The force operates under the unified command of United States military officers, at the request of the Iraqi Government . . . MNF-I forces detain individuals alleged to have committed hostile or warlike acts in Iraq, pending investigation and prosecution in Iraqi courts under Iraqi law." *Munaf*, 553 U.S. at 679.

9. *Munaf*, 553 U.S. 674, 680.

10. *Id.* at 702.

Following these decisions, the United States District Court for the District of Columbia and the District of Columbia Circuit Court of Appeals (hereinafter "D.C. Circuit Court of Appeals") handled over 200 habeas petitions filed on behalf of Guantanamo detainees.[11] As of 2011, a general trend in the outcomes of these habeas cases was obvious: detainees had prevailed in a majority of their cases in the district court, but their actual release from confinement had been stifled by the D.C. Circuit Court of Appeals' deference to the policies of the Executive Branch.[12]

Though there have been various issues in the Guantanamo cases, two of the most contested issues concern the ability of the courts to effectuate the release of detainees once they have prevailed on habeas petitions and the validity of court orders requiring the government to provide advance notice to detainees and their counsel prior to transfer from Guantanamo. The trend in the District of Columbia Circuit is evident in a line of cases regarding these issues. The district court in that circuit has assumed the power to effectuate release or require notice, only to be reversed at the appellate level based on the latter's interpretation of the Supreme Court's *Boumediene* and *Munaf* decisions.[13] Though there have been several petitions for certiorari to the United States Supreme Court requesting guidance and clarification of the D.C. Circuit Court of Appeals' jurisprudence on these issues, the merits have never been reached.[14]

This Comment will begin by examining the history of habeas petitions in Guantanamo cases, including the status of the law after September 11, 2001 and the Supreme Court's decisions in *Boumediene* and *Munaf* in 2008. It will then focus on a line of three cases in the D.C. Circuit which have raised separation of powers issues of the power of the court to release petitioners and the power of the court to order notice or enjoin transfers from Guantanamo. These cases, all named *Kiyemba v. Obama*, but distinguished as

11. Greenhouse, *supra* note 2.

12. Lyle Denniston, *Boumediene: The Record So Far*, SCOTUSBLOG (Jan. 2, 2011, 11:44 PM), http://www.scotusblog.com/2011/01/boumediene.

13. *See* Boumediene v. Bush, 553 U.S. 723 (2008); *Munaf*, 553 U.S. 674.

14. Lyle Denniston, *Down to the Last on Detainees*, SCOTUSBLOG (May. 23, 2011, 10:55 AM), http://www.scotusblog.com/2011/05/down-to-the-last-on-detainees/. At the end of the 2010 Supreme Court Term, all eight petitions for certiorari on various Guantanamo detainee issues failed to be addressed on the merits. *Id.* Additional petitions for certiorari pertaining to detainees' rights and the D.C. Circuit's interpretation of the law on these matters continue to be filed. *Id.*

Kiyemba I,[15] *Kiyemba II*,[16] and *Kiyemba III*,[17] have shaped the D.C. Circuit's policy of deference to the Executive. Following the discussion of these cases, this Comment will review three petitions for certiorari filed in the 2010 Term concerning the issues of release and transfer, none of which reached the Court on the merits.

Lastly, this Comment will discuss the petitioners' arguments for judicial authority under habeas jurisdiction and the Government's arguments for deference in foreign policy matters, and suggest that the Supreme Court should make the ultimate decision on where the power lies. Because these cases have been litigated in the D.C. Circuit, the opportunity for a circuit split does not present itself and the Circuit Court's decisions are controlling. The divergence between the rulings of the district court and the court of appeals within the D.C. Circuit as well as the balance between the Executive's role in foreign policy and the Judiciary's habeas powers are important issues that should be clarified by the nation's highest court.

II. LEGAL BACKGROUND

A. *Leading Up to the Landmark—A Brief Overview of the Road to* Boumediene

Following the terrorist attacks of September 11, 2001 ("9/11") and American military involvement in the Middle East, the United States government had to determine how to handle suspected terrorists who were captured by U.S. forces. After 9/11, Congress enacted the Authorization of Use of Military Force ("AUMF") which gave the President of the United States the authority to use "necessary and appropriate force" against people, groups or organizations involved in the terrorist attacks on American soil in order to prevent future acts of terrorism.[18] Under this authority, many individuals were captured and taken to the United States Naval Station in Guantanamo Bay, Cuba.[19] In 2004, the Supreme Court

15. Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022 (D.C. Cir. 2009) *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated as amended*, Kiyemba v. Obama (*Kiyemba III*), 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011).

16. Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509 (D.C. Cir. 2009), *cert. denied* 130 S. Ct. 1880 (2010).

17. *Kiyemba III*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011).

18. *Boumediene*, 553 U.S. at 733 (citing S.J. Res. 23, 107th Cong. (2001) (enacted)).

19. *Guantanamo Bay Naval Base (Cuba)*, N.Y. TIMES, April 25, 2011, http://topics.nytimes.com/top/news/national/usstatesterritoriesandpossessions/guantanamo

concluded that detention of such individuals for the duration of the conflict constituted power that was "necessary and appropriate" under AUMF.[20]

Following that decision, Combatant Status Review Tribunals ("CSRTs") were implemented in order to determine if the persons detained at Guantanamo were "enemy combatants," which is the standard used to decide whether that individual could be detained.[21] The procedures implemented in the CSRTs were intended to comply with necessary due process requirements.[22]

In 2002, the first petitions for habeas corpus were filed by detainees, but were initially dismissed for lack of jurisdiction until the Supreme Court confirmed that the district courts had jurisdiction.[23] After this determination, the D.C. Circuit consolidated the cases into two proceedings.[24] The judge presiding over the first set of cases held that there were no rights which could be remedied in a habeas action, and dismissed the cases.[25] The petitioners in the second set of cases were informed that they did have rights under the Due Process Clause of the Fifth Amendment.[26] The defeated parties in both sets of cases appealed.[27]

Meanwhile, as this litigation was occurring, Congress passed the Detainee Treatment Act of 2005, known as the DTA.[28] This statute effectively eliminated the jurisdiction of the courts to hear habeas petitions of Guantanamo prisoners, but granted to the D.C. Circuit Court of Appeals exclusive jurisdiction to review the determinations made by the CSRTs.[29] The Supreme Court then ruled in *Hamdan v. Rumsfeld*[30] that the DTA did not apply to any

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baynavalbasecuba/index.html,
http://www.nytimes.com/2008/06/13/washington/13scotus.html.

20. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

21. In re Guantanamo Detainee Litigation, 581 F. Supp. 2d 33, 36 (D.D.C. 2008), *rev'd sub nom. Kiyemba I*, 555 F.3d 1022 (D.C. Cir. 2009) *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated as amended, Kiyemba III*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011). An "enemy combatant" has been defined as "an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *Guantanamo Bay*, 581 F. Supp. 2d at 36.

22. *Boumediene*, 553 U.S. at 734.

23. *Id.* (citations omitted).

24. *Id.*

25. *Id.*

26. *Id.* at 734-35 (citations omitted).

27. *Boumediene*, 553 U.S. at 735.

28. *Id.* (citing Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, and 42 U.S.C.)).

29. *Id.* (citation omitted).

30. 548 U.S. 557, 576-77 (2006).

petitioners who had cases pending when the statute was enacted.[31] The Military Commissions Act of 2006 ("MCA")[32] was the response of Congress secondary to that decision.[33] Section 7 of the MCA caused jurisdiction to be stripped from all cases relating to detention, transfer or other circumstances pertaining to Guantanamo.[34] This litigation set the stage for the Supreme Court's landmark decision in *Boumediene v. Bush*.

B. June 12, 2008—An Important Day for Detainee Litigation

In *Boumediene*, several detainees, all of whom were foreign nationals who denied connections to al Qaeda or the Taliban, petitioned to the District Court for the District of Columbia for a writ of habeas corpus to challenge their detention.[35] After the *Hamdan* ruling which held that the DTA did not apply to cases which were pending at the time of enactment, the *Boumediene* Petitioners' cases were consolidated for appeal to the D.C. Circuit Court of Appeals.[36] The Circuit Court held that § 7 of the MCA removed jurisdiction from all federal courts to hear habeas petitions, that there was no privilege of habeas corpus or the Suspension Clause,[37] and that it was not necessary to determine whether the DTA review procedures were an adequate substitute for habeas corpus.[38]

After granting the Petitioners' writ of certiorari, the Supreme Court concluded that the MCA did take away the power of federal courts to hear habeas petitions,[39] but that the privilege of the Suspension Clause was effective at Guantanamo Bay, and any denials of habeas corpus were required to be in accordance with that Clause.[40] The Court noted that the privilege of habeas corpus provided the prisoner to "a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or in-

31. *Hamdan*, 548 U.S. at 576-77.

32. Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat 2600 (codified as amended in scattered sections of 10, 18, and 28 U.S.C.).

33. *Boumediene*, 553 U.S. at 735.

34. *Id.* (citations omitted).

35. *Id.* at 734.

36. *Id.* at 735.

37. U.S. CONST. art. I, § 9, cl. 2. The Suspension Clause provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.*

38. *Boumediene*, 553 U.S. at 735-36.

39. *Id.* at 739.

40. *Id.* at 771.

terpretation' of relevant law."[41] Importantly, the Court remarked that the court hearing the habeas petitions must "have the power to order the conditional release of an individual unlawfully detained–though release need not be the exclusive remedy[.]"[42] When considering the history of the Great Writ, and examining the review processes in effect under the DTA, the Supreme Court held that the procedures outlined in the statute were an insufficient substitute for habeas corpus.[43] Thus, the Court found § 7 of the MCA to be an unconstitutional suspension of the privilege of the writ of habeas corpus for Guantanamo detainees.[44]

Though the *Boumediene* decision, which expressly granted detainees the right to petition for a writ of habeas corpus, was heralded as a landmark case in Guantanamo litigation, the Supreme Court's decision in *Munaf v. Geren* on the same day would eventually play an important role in the separation of powers game which has encompassed the Guantanamo cases.

In *Munaf*, two American citizens, Omar[45] and Munaf,[46] voluntarily travelled to Iraq and were captured and detained under the MNF-I as security threats to the country.[47] Munaf was tried by the Criminal Court of Iraq, but the case was vacated and remanded for further investigation on appeal.[48] Omar's case was re-

41. *Id.* at 779 (citation omitted).

42. *Id.*

43. *Boumediene*, 553 U.S. at 792. The Court determined that factors that were detrimental to the DTA review process included the inability of the court of appeals to look to evidence outside of the CSRT record, which would prevent the court of appeals from looking at new evidence that was unavailable at the time of the initial hearing. *Id.* at 789-90. The Court also found the lack of language in the DTA statute permitting the remedy of release to be "troubling," but was willing to consider that release could be implied by the language of the statute. *Id.* at 787-88.

44. *Id.* at 792.

45. Shawqi Omar was a dual citizen of American and Jordan. Munaf v. Geren, 553 U.S. 674, 681 (2008). In 2004, he was captured by MNF-I forces after a raid at his home. *Munaf*, 553 U.S. at 681. This raid produced explosives, weapons, one Iraqi insurgent and four Jordanian fighters who provided sworn statements which implicated Omar in insurgent activities. *Id.* An MNF-I panel found that he was a threat to security, had committed warlike acts and was an enemy combatant. *Id.* In a subsequent hearing before the Combined Review and Release Board, the detention was affirmed. *Id.* at 682.

46. Munaf was serving as a translator for Romanian journalists in Iraq when the group was kidnapped. *Munaf*, 553 U.S. at 683. Upon suspicion that Munaf had orchestrated the kidnappings, he was detained after an MNF-I hearing and the case was transferred to the Criminal Court of Iraq, which found him guilty of kidnapping. *Id.* at 683-84. The decision was vacated and remanded for additional investigation. *Id.* at 684.

47. *Munaf*, 553 U.S. at 681, 683.

48. *Id.* at 684 (citation omitted).

ferred to the Criminal Court of Iraq for criminal prosecution.[49] Next-friend habeas petitions were filed in District Court for the District of Columbia by relatives of both men.[50] On certiorari, the men questioned whether the United States courts had jurisdiction over their petitions and, if so, whether the court could enjoin the multinational force from releasing them into Iraqi custody for prosecution.[51]

The Supreme Court consolidated the cases and granted certiorari after conflicting decisions in the lower courts.[52] The Supreme Court first held that the petitioners, even though detained overseas, had the privilege of habeas corpus.[53] The writ of habeas, however, was unable to afford Petitioners the remedy they sought. Because the Iraqi Government was a sovereign body which had the right to prosecute individuals for crimes committed within its borders, the writ of habeas corpus could not be used to compel the United States government to harbor alleged criminals.[54]

Although Munaf argued that his transfer would likely lead to torture, the Court determined that this was a decision that was to be addressed by the Executive, and not the Judiciary.[55] In language that would prove crucial in later Guantanamo cases, the Supreme Court cited to the fundamental principles of separation of powers and noted that "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area."[56] According to the Court, the determination of whether a person would likely face torture, and any remedies in the face of

49. *Id.* at 682. Counsel for Omar filed the habeas petition prior to the recommendation. *Id.* Once this was revealed, counsel obtained a preliminary injunction which barred Omar's removal from the custody of the United States or MNF-I, which was affirmed on appeal. *Id.* The court of appeals, however, held that the injunction could not be used to enjoin release. *Id.* at 682-83. It could only prevent the Government from transferring Omar to Iraqi custody, sharing information about release with the Iraqi Government, and presenting Omar to the Criminal Court of Iraq for prosecution. *Id.* at 683.

50. *Id.* at 682, 684. The district court dismissed Munaf's habeas petition for lack of jurisdiction. *Id.* at 684. The court of appeals affirmed, and distinguished Munaf's case from Omar's by declaring that Munaf had been convicted in an Iraqi proceeding while Omar had not. *Id.*

51. *Id.* at 680.

52. *Munaf*, 553 U.S. at 685.

53. *Id.* at 688 (citations omitted).

54. *Id.* at 697.

55. *Id.* at 700.

56. *Id.* at 702 (citation omitted).

this likelihood, were well within the province of the political branches.[57]

C. *D.C. Circuit Defines the Scope of Boumediene—The Parameters of Habeas Jurisdiction and the Court of Appeals' Deference to the Executive*

After the *Boumediene* and *Munaf* cases, it was clear that the United States district courts have habeas jurisdiction over detainee cases, and the District of Columbia Circuit has taken center stage in Guantanamo cases.[58] While many felt that *Boumediene* granted federal judges considerable control over the legal fate of detainees, the D.C. Circuit Court of Appeals used the Supreme Court's warning not to "second-guess" the Executive as its mantra in detainee cases. Though the district court ruled in several cases that a remedy, including actual release, was proper, the D.C. Circuit Court of Appeals has never approved such a release and has struck down district court orders seeking to control the fate of detainees.[59]

1. *Kiyemba I and Kiyemba III—Petitions for Release into the United States*

Following the *Boumediene* decision and after a determination by the Government that they were no longer "enemy combatants," seventeen Uighurs[60] detained at Guantanamo Bay for over seven years petitioned for the opportunity to challenge their detention as unlawful and requested to be released into the United States.[61]

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57. *Munaf*, 553 U.S. at 702.

58. After the 2004 case *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004), in which a Guantanamo habeas petition was transferred to the D.C. Circuit, all Guantanamo cases have been filed there. Petition for Writ of Certiorari at 28, *Kiyemba III*, 605 F.3d 1046 (D.C. Cir. 2010) (No. 10-775).

59. Lyle Denniston, *D.C. Circuit in Control on Detainees*, SCOTUSBLOG (Apr. 4, 2011, 9:36 AM), http://www.scotusblog.com/2011/04/dc-circuit-in-control-on-detainees.

60. Uighurs are a Turkic Muslim minority group who fled their native China, where they faced oppression, and moved to Afghanistan and lived in camps. Guantanamo Bay, 581 F. Supp. 2d 33, 34 (D.D.C. 2008), *rev'd sub nom. Kiyemba I*, 555 F.3d 1022 (D.C. Cir. 2009) *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated as amended, Kiyemba III*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011). The Government alleged that these camps housed Taliban supporters. *Guantanamo Bay*, 581 F. Supp. 2d at 34.

61. *Id.* The detainees originally filed habeas petitions in July 2005. Though several detainees were cleared for release over the next several years, all remained at Guantanamo. *Id.* at 35. All Uighur petitions were consolidated in 2008, and they were no longer deemed to be "enemy combatants." *Id.*

Because they were no longer classified as "enemy combatants," the issue presented to the district court was "whether the Government ha[d] the authority to 'wind up' the petitioners' detention" or if the court could authorize the release of the Uighurs.[62]

The district court decided that the Government's authority to "wind-up" the detentions ceased when "(1) detention becomes effectively indefinite; (2) there is a reasonable certainty that the petitioner will not return to the battlefield to fight against the United States; and (3) an alternative legal justification has not been provided for continued detention. Once these elements are met, further detention is unconstitutional."[63] Under this framework, the court decided that the time for wind-up authority had ended, and looked to the remedies the judiciary could utilize under its habeas jurisdiction.[64] The court concluded that based on separation of powers, the courts had authority to protect individual liberty, especially when the Executive Branch brought the person into the court's jurisdiction and then undermined the efforts of release.[65] Noting that the Executive could not have the power to limit the scope of habeas by merely assuring the court that it was using its best efforts to release the detainees, the court held that under the system of checks and balances and the importance of separation of powers to the protection of liberty, the motion for release was granted.[66]

In the case renamed *Kiyemba v. Obama* on appeal, and commonly referred to as *Kiyemba I*, the D.C. Circuit Court of Appeals reversed, framing the issue as whether the courts had authority to issue release into the United States.[67] Because there was the potential that the Petitioners would be harmed if returned to their native China, the Government asserted that they had been undergoing extensive efforts to relocate the detainees in suitable third countries.[68] The court based its reversal on case law that held that the power to exclude aliens from the country was an inherent Executive power, and not one with which the courts should inter-

62. *Id.* at 35.
63. *Id.* at 38.
64. *Id.* at 38-39.
65. *Guantanamo Bay*, 581 F. Supp. 2d at 42-43.
66. *Id.* at 42.
67. *Kiyemba I*, 555 F.3d 1022, 1032 (D.C. Cir. 2009) *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated as amended*, *Kiyemba III*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011).
68. *Kiyemba I*, 555 F.3d at 1024.

fere.[69] Though Petitioners claimed that release was within the court's habeas power, the court of appeals noted that the Petitioners sought more than a "simple release"—they sought to be released into the United States, and habeas could not interfere with the Executive's power to control the borders.[70]

The Supreme Court granted the Petitioner's writ of certiorari in which they argued that the courts had the authority to issue release of unlawfully detained prisoners under its habeas power and to hold otherwise constituted a conflict with *Boumediene*.[71] By the time the case reached the High Court for determination on the merits, all of the detainee-Petitioners received resettlement offers, and only five had rejected these offers.[72] Due to the possibility of a factual difference based on this new information, the Supreme Court remanded the case to the D.C. Circuit Court of Appeals.[73]

The remanded case became known as *Kiyemba III*.[74] The court of appeals reinstated its former opinion from *Kiyemba I*.[75] The D.C. Circuit Court of Appeals noted that just prior to the *Kiyemba I* decision, the government filed information under seal which indicated that all seventeen Petitioners had received a resettlement offer, and this influenced the court's conclusion that the Government was engaging in diplomatic efforts to relocate the detainees when it decided *Kiyemba I*.[76] Even if the Petitioners had a valid reason to decline these offers, it did not change the underlying notion that habeas afforded no remedy to be released into the United States.[77] Additionally, the court determined that the Petitioners had no privilege to have the courts review the determinations made by the Executive regarding the locations of resettlement, as this was a foreign policy issue for the political branches to handle.[78]

The five remaining petitioners filed a second petition for certiorari on December 8, 2010, asking the Supreme Court to decide

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69. *Id.* at 1026 (citation omitted).

70. *Id.* at 1028.

71. Petition for Writ of Certiorari at 30, *Kiyemba I*, 555 F.3d 1022 (D.C. Cir. 2009) (No. 08-1234).

72. Kiyemba v. Obama, 130 S. Ct. 1235, 1235 (2010) (per curiam).

73. *Kiyemba*, 130 S. Ct. at 1235.

74. *Kiyemba III*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011).

75. *Kiyemba III*, 605 F.3d at 1047.

76. *Id.*

77. *Id.* at 1048.

78. *Id.* (citing *Kiyemba II*, 561 F.3d 509, 514-16 (D.C. Cir. 2009), *cert. denied* 130 S. Ct. 1880 (2010) (discussing Munaf v. Geren, 553 U.S. 674, 701-02 (2008)).

whether the courts had the power to release unlawfully detained aliens under its habeas jurisdiction.[79]

2. *Kiyemba II and Petitions Requesting Notice of Transfer Prior to Release*

While the *Kiyemba I* and *Kiyemba III* litigation was occurring, a separate Uighur petition was moving through the D.C. Circuit. Nine Uighurs petitioned the district court for a writ of habeas, and asked the court to require the government to provide 30 days' advance notice of any transfer from Guantanamo based on fear of torture, and the district court granted the petition.[80] The cases were consolidated on appeal and renamed *Kiyemba v. Obama*, which is referred to as *Kiyemba II*. The *Kiyemba II* case has been the source of much debate over both the proper allocation of power in the tripartite system and the D.C. Circuit Court of Appeals' use of Supreme Court precedent in detainee cases. The D.C. Court of Appeals analogized the Uighurs' claims in the *Kiyemba II* case to the 2008 Supreme Court decision *Munaf v. Geren*, which held that habeas corpus did not prevent the transfer of an American citizen in captivity in Iraq to face prosecution in a sovereign state.[81]

The court of appeals analyzed the Uughurs' claims by comparing them to the *Munaf* petitioners. First, the court found that the Uighurs and the petitioners in *Munaf* sought an order of the district court to enjoin their transfer based on fear of torture in the recipient country.[82] As in *Munaf*, the court decided that if the United States Government had asserted that it was against its policy to transfer detainees to a location where they may face torture, the Judiciary could not question that determination.[83] In reaching that conclusion, the *Kiyemba II* court cited to the *Munaf* language that the Judiciary should not "second-guess" the Executive in matters of foreign policy.[84]

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79. Petition for Writ of Certiorari, *Kiyemba III*, *supra* note 58, at i.

80. *Kiyemba II*, 561 F.3d at 511.

81. *Id.* at 514 (referring to *Munaf*, 553 U.S. 674).

82. *Id.* at 514.

83. *Id.* (citation omitted).

84. *Id.* (citations omitted). The Petitioners attempted to distinguish *Munaf* by noting that those petitioners did not bring a claim under the Convention Against Torture as implemented in by the Foreign Affairs Reform and Restructuring Act. *Id.* (citing *Munaf*, 553 U.S. at 703 n.6). The Court rejected that distinction, and noted that judicial review was limited under that statute to challenge final orders of removal, and the Uighurs were not challenging such orders. *Id.* at 514-15.

Just as the court rejected the fear of torture argument, the Petitioners' claims that transfer should be enjoined to prevent continued detention or prosecution in the recipient country was also denied based on *Munaf*.[85] As *Munaf* reasoned, detainees could not use habeas as a means to hide from prosecution in a sovereign country, and any judicial investigation into a recipient country's laws and procedures would violate international comity and the Executive Branch's role as the sole voice on foreign policy.[86] Additionally, because the 30 days' notice requirements were seen as an attempt by the courts to enjoin the transfer of a detainee, they, too, were impermissible remedies.[87]

Judge Griffith, concurring and dissenting in part, opined that *Munaf* did not require total deference to the political branches in detainee matters, that privileges of detainees outlined in *Boumediene* required advance notice of any transfer from Guantanamo, and the opportunity to challenge the Government's determination that transfer to the recipient country would not result in torture or additional detainment.[88] The Judge distinguished *Munaf* from the present situation because in the former, the petitioners knew they were going to be transferred to Iraqi custody and had an opportunity to bring habeas petitions to challenge that transfer.[89] In closing, Judge Griffith believed that "[t]he constitutional habeas protections extended to these petitioners by *Boumediene* [would] be greatly diminished, if not eliminated, without an opportunity to challenge the government's assurances that their transfers will not result in continued detention on behalf of the United States."[90]

Following this reversal, the Petitioners filed a motion for rehearing and suggested a rehearing en banc, as well as a stay of the mandate of the D.C. Circuit Court of Appeals.[91] Both of these motions were denied, and the Petitioners filed a writ for a petition of certiorari on November 10, 2009.[92] The Supreme Court denied the writ on March 22, 2010.[93]

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85. *Kiyemba II*, 561 F.3d at 515.
86. *Id.* at 515 (quoting *Munaf*, 553 U.S. at, 700-01).
87. *Id.* at 515-16.
88. *Id.* at 523 (Griffth, J., concurring in part and dissenting in part).
89. *Id.* at 526.
90. *Kiyemba II*, 561 F.3d at 526
91. Petition for Writ of Certiorari at 12, *Kiyemba II*, 561 F.3d 509 (D.C. Cir. 2009) (No. 09-581).
92. *Id.*
93. Kiyemba v. Obama, 130 S. Ct. 1880 (2010).

D. Supreme Court Denies Certiorari in 2010 Term in Guantanamo Detainee Cases

Following the extensive litigation in the District of Columbia Circuit regarding issues of Guantanamo detainees, the Supreme Court's 2010 Term was presented with eight petitions for certiorari asking to address various issues.[94] Three of these petitions involved separation of powers issues and the courts' ability to effectuate release, transfer and notice in habeas proceedings. *Kiyemba III* was presented before the 2010 Term, raising for a second time the issue of whether the courts could issue the release of a petitioner. Two other petitions, *Mohammed v. Obama* and *Khadr v. Obama*, asked the Supreme Court to reconsider the D.C. Circuit Court of Appeals' use of the *Munaf* precedent in *Kiyemba II*.

Petitioners in *Kiyemba III* were the remaining five Uighurs who had not accepted the Government's relocation offers and remained at Guantanamo.[95] They continued to seek a judicial order that would permit them to be released into the United States, and argued that the D.C. Circuit had impermissibly limited the power of the judiciary by making it an advisor to the Executive with no power to order release under its habeas power.[96] Due to several facts including the availability of several offers for the petitioners to take, the lack of a meritorious argument as to the inappropriateness of the proposed offers, and the Government's continued efforts to find adequate resettlement, the Supreme Court denied certiorari on April 18, 2011.[97]

Petitioners Mohammed and Khadr presented the same issue to the Court: whether *Munaf* required and *Boumediene*, the Suspension Clause, and Due Process permitted the district courts in habeas cases to accept the government's assurances that the petitioner was unlikely to be tortured if transferred to a recipient country which would divest the court from fashioning a remedy and prevent the petitioner from challenging that determination.[98]

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94. Lyle Denniston, *Primer: The New Detainee Cases*, SCOTUSBLOG (Dec. 7, 2010, 7:47 PM), http://www.scotusblog.com/2010/12/primer-the-new-detainee-cases/.

95. *Kiyemba*, 130 S. Ct. at 1235.

96. Petition for Writ of Certiorari, *Kiyemba III*, *supra* note 58, at 2-3.

97. *Kiyemba*, 131 S. Ct. at 1631.

98. Petition for Writ of Certiorari at i, Mohammed v. Obama, 131 S. Ct. 2901 (2011) (No. 10-746); Petition for Writ of Certiorari at 6, Khadr v. Obama, 131 S. Ct. 2900 (2011) (No. 10-751).

Petitioner Mohammed was an Algerian citizen who was captured in Pakistan in 2002 and sent to Guantanamo.[99] He initially filed a petition for habeas corpus in 2005, and while the petition was pending, Mohammed was set to be transferred from Guantanamo.[100] In November 2009, the district court granted Mohammed's petition for habeas corpus and ordered the Government to ". . . take all necessary and appropriate steps to facilitate [his] release forthwith."[101] Upon the Government's appeal, the motion was suspended.[102]

While Mohammed's petition was being litigated, the district court also issued 30-day advance notice orders in all habeas cases after the *Boumediene* decision in 2008.[103] The validity of these orders was to be discussed for the first time in *Kiyemba II*.[104] Prior to the final decision in *Kiyemba II*, the district court also enjoined the Government from transferring Mohammed to Algeria, and the Government's appeal was deferred until the *Kiyemba* case was decided.[105] After *Kiyemba II* suggested that the lower courts should refrain from "second-guessing" the Executive Branch's conclusions about the possibility of torture in countries where detainees may be transferred, the Government filed a motion to dissolve the preliminary injunction preventing Mohammed's transfer.[106] This motion was granted on the basis of the recent *Kiyemba II* decision.[107]

A motion for reconsideration filed by Mohammed was denied, and he subsequently filed an emergency petition for a preliminary injunction against transfer based on his fear of torture if returned to Algeria.[108] The district court entered an administrative stay pending the final decision on the preliminary injunction, and a

99. Petition for Writ of Certiorari, *Mohammed*, *supra* note 98, at 1-2.
100. *Id.* at 2.
101. Mohammed v. Obama, 689 F. Supp. 2d 38, 69 (D.D.C. 2009).
102. Petition for Writ of Certiorari, *Mohammed*, *supra* note 98, at 2. Because the petition was originally filed under seal, portions of the petition have been redacted in the released version.
103. *Id.* at 3.
104. *Id.*
105. *Id.* at 3-4.
106. *Id.* at 5.
107. Petition for Writ of Certiorari, *Mohammed*, *supra* note 98, at 5 (citation omitted).
108. *Id.* at 5-6.

hearing was held after which the district court granted the injunction by distinguishing the *Munaf and Kiyemba II* cases.[109]

The court of appeals held that the district court erred in granting the injunction based on its interpretation of *Munaf* in *Kiyemba II*.[110] The D.C. Circuit Court of Appeals denied Mohammed's request for stay pending a petition for certiorari to the Supreme Court, and he then petitioned the Supreme Court to order such a stay.[111] On July 16, 2010, the Supreme Court denied the petition, but three dissenting Justices sparked new hope for the Guantanamo petitioners: Justice Ginsberg, Justice Breyer and Justice Sotomayor dissented from the denial of the stay, noting that they "would grant the stay to afford the Court time to consider, in the ordinary course, important questions raised in this case and not resolved in *Munaf v. Geren*[.]"[112]

As several Justices seemed to be questioning the D.C. Circuit Court of Appeals' use of the *Munaf* case and the impact of the court of appeals' interpretation of that decision on the entire scope of detainee litigation, a petition for writ of certiorari was filed in the *Mohammed* case.[113] Before the Supreme Court could address the case, however, the petition became moot as Mohammed was transferred to Algeria on January 5, 2011.[114]

The *Khadr* petition arose from the 2008 notice orders issued by the district court which were vacated by the court of appeals based on *Kiyemba II*'s position that the courts could not enjoin the transfer of a detainee.[115] Because the issue in *Khadr* was identical to the *Mohammed* petition regarding the power of the courts to enjoin transfer by requiring notice for the petitioner to have the opportunity to present evidence to counter the Government's assurances, the petition incorporated the arguments outlined in *Mohammed*.[116]

Though the Supreme Court could not grant certiorari in *Mohammed*, the Court chose not to address the issue in *Khadr* as

109. *Id.* at 6-7. The district court believed that *Munaf* was different because it involved criminal conduct, rather than an individual who had a right to freedom, and that *Munaf* did not involve fear of torture at the hands of non-governmental entities. *Id.* at 7.

110. *Id.* at 10 (citing *Kiyemba II*, 561 F.3d 509, 516 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010); Munaf v. Geren, 553 U.S. 674 (2008)).

111. *Id.* at 10-11.

112. Mohammed v. Obama, 131 S. Ct. 32 (2010).

113. Petition for Writ of Certiorari, *Mohammed*, *supra* note 98.

114. Final Status Report and Mot. to Dismiss Appeals as Moot at 2, *Mohammed v. Obama* (Nos. 10-5034 & 10-5045).

115. Petition for Writ of Certiorari, *Khadr*, *supra* note 98, at 2.

116. *Id.* at 6.

certiorari was denied on May 23, 2011.[117] Out of the eight Guantanamo petitions filed in the 2010 Term, the Supreme Court denied *Kiyemba III*, *Khadr* and five others, and the *Mohammed* petition was rendered moot.

III. ANALYSIS

A. Arguments for a Remedy

By urging deference to the Executive Branch, the D.C. Circuit Court of Appeals has scolded the district courts that have second-guessed the political branches' determinations about release and suitable transfers. Those in favor of judicial power have argued that the denial of the right to review the Executive's decisions is allowing too much deference to that branch and severely limiting the remedies that courts have had the power to issue in the past.

Though the petitioners have made several arguments for relief, the main arguments for judicial power stem from the idea that the court of appeals has been improperly applying Supreme Court precedent. Petitioners have argued that the D.C. Court of Appeals expanded the scope of *Munaf* too broadly as the Supreme Court noted that the decision was limited to the facts of that case.[118] In *Munaf*, the Court was primarily concerned about allowing the Iraqi government to have the power to punish people who had committed crimes in that territory when fashioning its holding, and the petitioners in that case had the opportunity of notice because they were told about their transfer and were able to petition the court to try and prevent it.[119] Petitioners have argued that those facts are entirely different than cases such as *Mohammed* and *Khadr* were there was concern of torture in foreign nations but no need to allow those nations to have the ability to prosecute the detainees for crimes, there was potential for torture at the hands of non-government entities, and no notice of transfer was permitted.[120]

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117. Khadr v. Obama, 131 S. Ct. 2900 (2011). Justice Breyer and Justice Sotomayor would have granted the petition. *Id.*

118. Petition for Writ of Certiorari, *Mohammed*, *supra* note 98, at 12-14.

119. *Id.* at 14-15.

120. *Id.* *See* Petition for Writ of Certiorari, *Khadr*, *supra* note 98, at 6 (incorporating *Mohammed* arguments). *See also* Petition for Writ of Certiorari at 12, Abdah v. Obama, 630 F.3d 1047 (D.C. Cir. 2011) (No. 11-421).

Additionally, Petitioners have argued that the use of *Munaf* has impermissibly limited *Boumediene* by preventing courts from fashioning equitable relief for habeas petitions.[121] There has been concern that the ability to use the writ of habeas will be essentially eliminated if there is no chance for a petitioner to challenge the Executive Branch's determinations regarding safe transfers. The *Boumediene* Court spent considerable time discussing the history of the writ[122] and noted that the tribunals implemented in that case to determine enemy combatant status were not a sufficient replacement for the writ of habeas because they lacked, in part, the authority to issue an order of release.[123] Here, the D.C. Circuit Court of Appeals has effectively prevented the other courts from determining if there is a right not to be transferred, which has been argued to be an inadequate statement of the right of habeas.[124] Similarly, it has been argued that by accepting the Executive Branch's assurances of its efforts to release the detainees, the courts are not properly using the power of habeas corpus that has been granted to them by the Constitution.[125] By refusing to question these assertions, the courts would be unable to offer a remedy to the petitioners who have the privilege of habeas corpus.[126]

The Petitioners also argued a due process right to challenge transfers as the detainees have a right to a meaningful hearing to at least have the opportunity to challenge the Government's conclusions regarding safety.[127] By refusing to second-guess the Executive, the judiciary may be losing an important check on the former's power because there is no guarantee that the Executive is ensuring safety or making the best effort to protect the unlawfully kept detainees. Without allowing courts to have the power to enjoin a transfer in order to examine these concerns, there is the potential that the detainee could be harmed at the hands of foreign terrorists.

Without the ability to challenge the Executive Branch through the judicial tool of habeas corpus, there has been genuine concern that the courts are losing too much power and that their authority

121. Petition for Writ of Certiorari, *Mohammed*, *supra* note 98, at 17.
122. Boumediene v. Bush, 553 U.S. 723, 739-47 (2008).
123. *Boumediene*, 553 U.S. at 792.
124. Petition for Writ of Certiorari, *Mohammed*, *supra* note 98, at 18.
125. Petition for Writ of Certiorari, *Kiyemba I*, *supra* note 71, at 16-17.
126. *Id.* at 17
127. *Id.* at 31-33.

is being improperly limited, as they are not utilizing their constitutional power properly.

B. Arguments for Deference

Based on *Kiyemba II*'s use of *Munaf*, the D.C. Circuit Court of Appeals has determined that the courts cannot prevent a government transfer from Guantanamo to another country once the government has determined that the prisoner will not be subject to torture in that country.[128] The court has also urged deference to the political branches' assertions that they are working to release prisoners in a timely manner.[129] The court has seemed to follow an "if you say so" policy to the declarations of the Executive Branch in making decisions that impact the rights of the Guantanamo detainees.

The Government has argued that there is a necessity to deference because of the sensitive nature of the issues in these cases. The D.C. Circuit Court of Appeals in *Kiyemba II* noted that requiring pre-transfer notice would interfere with the Executive Branch's ability to engage in negotiations with foreign nations for the transfer of detainees.[130] The Executive Branch has the power to conduct the foreign affairs of the United States, and there is significant time and effort that goes into establishing relationships with foreign states in our nation's diplomatic endeavors.[131]

It has been the established government policy to prevent the transfer of a detainee when there is a possibility of facing torture, and the D.C. Circuit Court of Appeals has not allowed interference with those declarations.[132] If the government has investigated the recipient nations in the transfer cases and has come to a conclusion that the transfer will be safe, allowing judicial interference may anger the recipient nations with accusations of human rights violations. Furthermore, such judicial determinations could undermine the Executive Branch's efforts of gaining the recipient nation's trust in order to facilitate an exchange of important information about the inner-workings of these governments. Furthermore, it has not traditionally been the realm of the courts to

128. *Kiyemba II*, 561 F.3d 509, 516 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010).

129. *Kiyemba III*, 605 F.3d 1048 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011).

130. *Kiyemba II*, 561 F.3d at 514.

131. Brief for Respondents in Opposition at 16-17, *Kiyemba II*, 561 F.3d 509 (D.C. Cir. 2009) (No. 09-581).

132. *Kiyemba II*, 561 F.3d at 514.

investigate foreign diplomacy. By allowing judicial interference, the veil of confidentiality in the diplomatic negotiations could be in peril.[133]

The Government has argued that the D.C. Circuit Court of Appeals correctly applied *Munaf* to the issue of whether a court can prevent the transfer of a detainee to a foreign nation upon release from confinement.[134] Citing as proof that the *Kiyemba II* was proper, there have been numerous cases that have reaffirmed it, and the Supreme Court has denied certiorari in that case.[135]

The Government has also rejected attempts to distinguish the *Munaf* case. The Government disclaimed the factual distinctions, and noted that the main similarity was the fact that the Government in both instances provided assurances that the detainees would not be transferred to countries where torture was likely.[136] The Government also asserted that the argument that *Munaf* was limited to its facts should not be read so narrowly, as it rationale was not as limited.[137] Regardless of the factual distinctions, the petitioners still sought the same remedy—an injunction to prevent transfer based on torture—that should be governed under the authority of the Executive.[138]

Due process arguments have also been foreclosed by *Munaf* in the view of the Government because the political branches have the power to decide whether a foreign nation's policies are just, thus giving the judiciary no place in assessing whether transfers should be avoided on the basis of a potential loss of constitutional rights.[139] The courts are not an avenue to challenge the Executive Branch's conclusions of which foreign nations would potentially torture transferred detainees on the basis of due process.

Lastly, the Government has contended that the *Kiyemba II* decision does not undermine or limit the Supreme Court's holding in *Boumediene* because that case and *Munaf* were decided on the same day by the Supreme Court and *Munaf* directly stated that habeas relief is unavailable in some situations, namely when the

133. Brief for Respondents in Opposition, *Kiyemba II*, *supra* note 131, at 20-21.
134. Brief for Respondents in Opposition at 5-6 Khadr v. Obama, 131 S. Ct. 2900 (2011) (No. 10-751).
135. *Id.* at 5.
136. Brief for Respondents in Opposition, *Kiyemba II*, *supra* note 131, at 21-22.
137. *Id.* at 23.
138. *Id.*
139. Brief for Respondents in Opposition, *Khadr*, *supra* note 134, at 10.

government has decided that torture is unlikely to result after transfer.[140]

In the separation of powers struggle, those in favor of deference have viewed the Executive Branch as a trustworthy and diligent diplomat, investigating and negotiating in order to resettlement for Guantanamo detainees.[141] Such foreign policy issues are arguably properly before the Executive Branch and are not a matter of concern for the judiciary because the courts are not engaged in diplomatic relations. While the time of detainment may be extended as a result of these investigations, the argument is that the Government is merely doing the job which it has power to do. The major concern is that the Executive Branch is engaging in delicate diplomacy and district court judges who are not involved in those negotiations and do not know the entirety of the situation would have the ability to sever those diplomatic lines and in the long run, harm detainees' chances of safe transfer due to foreign nation's anger or refusal to cooperate if they were able to second-guess the Executive.

C. The Need for Supreme Guidance

In light of the compelling arguments on both sides, several important issues have ambiguous answer, and the Supreme Court has, thus far, not chosen to shine light on the situation. Following the 2010 October Term and the Supreme Court's denial of all Guantanamo detainee petitions, the High Court has sent a message that it does not want to review the D.C. Circuit's interpretation of the procedural and substantive issues which that Circuit has implemented.

The Supreme Court has not ruled on any cases relating to Guantanamo detainees since its 2008 decision in *Boumediene v. Bush*. While the Court settled the issue of whether detainees had the privilege of habeas corpus in that case, the Court left the intricacies of the writ and its scope for the lower courts to define. Though leaving this authority in the hands of the lower courts may have been a been appropriate at the time *Boumediene* was decided, the number of habeas petitions and the subsequent petitions for certiorari to the Supreme Court indicate that there are important issues that must be clarified, and the Supreme Court

140. *Id.*

141. Brief for Respondents in Opposition at 15, *Kiyemba III*, 605 F.3d 1046 (D.C. Cir. 2010) (No. 10-775).

should grant certiorari to be the final voice on these issues for several reasons.

First, the stakes in these habeas petitions are high. The detainees at Guantanamo have already been assured the right to petition the courts for habeas corpus to challenge their detention as unlawful. The scope of the courts' authority to provide a remedy is a critical for those individuals on a personal level as well as for the nation as whole. This country was created with a tripartite system and checks and balances for a reason: the Founding Fathers implemented a governmental structure that would serve to limit the three individual branches in order to protect individual liberty.[142] The writ of habeas corpus has an extensive history and is considered to play an integral role in the protection of individual liberty.[143] Habeas corpus is the Judiciary's tool to check the power of the Executive, and has traditionally allowed courts to provide a remedy to reign in the unbridled power of the Executive. The Court in *Boumediene* asserted that habeas gave the prisoner a meaningful opportunity to challenge his confinement as unlawful, and "the habeas court must have the power to order conditional release of an individual unlawfully detained – though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted."[144]

While the importance of the writ for the preservation of the individual liberty and as a check on Executive power is one aspect of the tripartite system, the Executive's interest in maintaining a unified voice in the realm of foreign policy is another key concern. By allowing the courts to order release of a detainee or to order advance notice of transfer so that the petitioner may present evidence that he would be harmed in a recipient country, the Judiciary would be forced to make determinations about foreign affairs that its judges may not be competent to make. In a time of chaos and intricate foreign relations, the sensitivity and difficulty of forging meaningful diplomatic relations with other nations at this time in history is a key concern of the Executive, and properly within that Branch's authority under the Constitution. Permitting the Judiciary to make determinations from the bench about the appropriateness of human rights or other similar determinations in a judicial proceeding could very well damage the diplo-

142. Boumediene v. Bush, 553 U.S. 723, 742 (2008).
143. *Boumediene*, 553 U.S. at 742.
144. *Id.* at 779.

matic relations that the Executive is attempting to form with recipient nations.

This separation of powers dilemma facing the High Court has no easy solution, but the critical role that the proper allocation of authority plays in the separation of powers system and the lack of substantive guidance on Guantanamo issues since *Boumediene* in 2008 demands attention from the Supreme Court. Additionally, because the Guantanamo cases have been litigated in the D.C. Circuit, no other appellate courts have had the opportunity to review these issues.[145] Without the opportunity for an opposing view in another judicial circuit and with no final determination by the Supreme Court, the D.C. Circuit Court of Appeals has been free to shape the law of Guantanamo habeas cases as it wishes. Adding to the concern of the lack of a "check" on the D.C. Circuit Court of Appeals is the fact that the trend within the Circuit itself has been inconsistent as the district courts have assumed a greater role for the judiciary, only to be chastised on appeal for failure to defer to the political branches in these cases.

With the D.C. Circuit serving as the sole authority on the scope of the courts' habeas power in Guantanamo cases, petitioners' claims that this court has been improperly applying Supreme Court precedent is another concern that the High Court should address. In both release and transfer cases, the petitioners have argued that while *Boumediene* assures the privilege of habeas corpus, the *Kiyemba* cases have foreclosed the courts from fashioning a remedy in contradiction to *Boumediene*.[146] Instead, the D. C. Circuit Court of Appeals has refused to interfere, based on the *Munaf* proposition that the determinations of the Executive should not be second-guessed, and has accepted the assurances of the Executive Branch that they are working secure release or that they will not send detainees to countries where it is more likely than not that they will face torture.

Raising suspicions that the use of *Munaf* in the Guantanamo habeas cases was perhaps improper, three Supreme Court Justices questioned the role of that decision and the questions it raised. Petitioners have alleged that the circumstances of that case are markedly different than the facts in the Guantanamo cases, and that *Munaf* should not be read to bar detainees in habeas petitions

145. Petition for Writ of Certiorari, *Kiyemba III*, *supra* note 58, at 28.
146. *Boumediene*, 553 U.S. at 779.

the opportunity to challenge their transfer or the court to enjoin such a transfer.

The nature of these Guantanamo issues presents a complex situation that makes the separation of powers issue more difficult. If the courts do traditionally have the power to require notice or order release under its habeas authority, the manner in which that remedy would require inquiry into the Executive Branch's policy decisions may cross the line into a political question. Because of the nature of diplomacy and foreign affairs in contemporary society, the thought may be that it is easier to reduce the rights of the individual in order to provide for the national security of the country as a whole.

IV. CONCLUSION

There are valid arguments on both sides in this issue and the nature of the cases and the times in which we live complicate the situation. The Supreme Court is in a difficult situation—if the Court grants certiorari to review the D.C. Circuit Court of Appeals' jurisprudence of the Guantanamo cases, it must settle an issue of vast importance. Separation of powers and the roles of the Executive and Judiciary in the context of Guantanamo litigation impact the individual liberty of the petitioners and the sensitive nature of foreign affairs and the war on terrorism. Because of significance of these issues, the D.C. Circuit should not be the sole voice addressing them. It should be the responsibility of the nation's Highest Court to settle the debate and determine the appropriate balance of power. Without this supreme guidance, the petitioners will continue to present the same issues and questions to the courts, and these cases will continue to be litigated according to the trend that has dominated the D.C. Circuit over the past several years.

With a new Supreme Court Term beginning and new Guantanamo cases bearing old issues appearing before the Court again, the Supreme Court should grant certiorari to review the delicate balance between the power of the courts and the authority of the political branches. The Court left the scope of habeas power undefined after *Boumediene* and has refused to substantively address the issues created in its aftermath. Since that decision, the D.C. Circuit has given great deference to the Executive Branch. Without any supreme guidance, the D.C. Circuit has been free to fashion the law as it sees fit with no further checks and balances on that interpretation as this Circuit is the sole decision-maker re-

garding these habeas petitions. If the current system stays in place, appeals and petitions regarding the same issues for Guantanamo detainees will continue to cycle through the D.C. Circuit. With so many petitions to the High Court on the same subject, it seems only logical that the Supreme Court should finish what it started nearly six years ago and decide whether the courts have a role to play in the release and transfer of detainees. More Guantanamo petitions for certiorari have been filed in the 2011 Term, and one has raised a familiar issue yet again: whether the Guantanamo detainees have the right to challenge transfer to a recipient nation on fear of torture.[147]

The Founding Fathers envisioned a system of checks and balances in order to protect the People from oppression and to prevent any one person or entity from hoarding too much power. The struggle for power between the branches of our government is something that will never fade away entirely, and there are times when it is proper for one branch to defer to the judgment of another, but when an issue arises that has raised so many questions and has been the foundation for numerous appeals and petitions to the Supreme Court for clarification, the People deserve at least some guidance on such an unsettled area of the law. As of now, the D.C. Circuit has been trustworthy of the Executive Branch, and, while in the end, such deference in this area may be appropriate, the very nature of habeas corpus is a strong tool in the hands of the judiciary which should be considered by the Supreme Court. The Court should analyze whether allowing deference strips the Judiciary of the important check of habeas corpus because granting the right of habeas corpus to prisoners without giving the courts the subsequent power to remedy the problem has the potential of making this important right just a phrase with no underlying force.

Jennifer L. Milko

147. Petition for Writ of Certiorari, *Abdah*, *supra* note 120, at i.